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In the Supreme Court of the United States

OCTOBER TERM, 1964

ALBERT J. MINICHELLO, NICHOLAS MAURIELLO AND YGNATZ YUCHNIS, ON A DERIVATIVE ACTION ON BEHALF OF THEMSELVES AND ON BEHALF OF OTHER STOCKHOLDERS OF THE FIRST NATIONAL BANK OF EXETER SIMILARLY SITUATED, PETITIONERS

v.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY FOR THE UNITED STATES OF AMERICA, FIRST NATIONAL BANK OF EXETER, WYOMING NATIONAL BANK OF WILKES-BARRE, AUGUST J. LIPPI, ETTORE LIPPI, JOHN LIPPI, JOHN B. CAMPBELL, GEORGE MAFFEI AND HAROLD REICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT SAXON, COMPTROLLER OF THE CURRENCY, IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21–39) is reported at 337 F. 2d 75. The memorandum and opinion of the District Court for the Middle District of Pennsylvania (App. 33a–35a; 123a–129a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1964, and a timely petition for rehearing on behalf of respondent Comptroller was denied on November 3, 1964. The petition for a writ of certiorari was filed on January 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a board of directors of a national bank, which entered into a contract for the bulk sale of its assets at a time when the bank was in a conservatorship, has authority to ratify that contract subsequent to the conservatorship.

2. Whether, assuming that the determination of the Comptroller of the Currency that an emergency exists sufficient to waive the requirement that a bulk sale of assets of a national bank be approved by two-thirds of the stockholders is subject to judicial review, such review is limited to an appraisal of the reasonableness of his determination.

STATUTE INVOLVED

R.S. 5220, as amended by the Act of September 8, 1959, provides in pertinent part (12 U.S.C. (Supp. V) 181):

> *Voluntary dissolution; appointment and removal of liquidating agent or committee; examination.*
>
> Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of any of its assets to and the assumption

of its deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval.

* * * * *

STATEMENT

1. The basic facts are set forth in the opinions below (App. 125a–129a; Pet. App. 22–24[1]). They may be summarized as follows:

On January 29, 1962, a shortage in excess of $200,000 was discovered at the First National Bank of Exeter (hereafter "Exeter"), and, by February 19, 1962, the shortage was ascertained to be $448,000 (App. 125a; Comp. App. 1b). Although the bank had deposits of almost $3 million, its capital, surplus and undivided profits, totaled only $350,000, an amount insufficient to cover the shortage (Comp. App. 1b; Pet. App. 40). The bank had a fidelity bond of $200,000. A second "excess" fidelity bond of $1,000,000 had been purchased by Exeter's cashier, but apparently without the knowledge or consent of the board of directors, and the bonding company initially disclaimed any liability on it (Comp. App. 1b, 2b; App. 62a).

During the period from January 29 to February 19, 1962, the Comptroller urged Exeter's directors to re-

[1] "App." references are to the Appellants' Appendix in the court of appeals; "Comp. App." references are to the Appendix of the Appellee, Comtroller of the Currency; "Wy. App." references are to the Appendix of Appellee Wyoming National Bank; and "Pet. App." references are to the Appendix to the Petition for a Writ of Certiorari.

organize or sell the bank.[2] On February 15, 1962, the First National Bank of Pittston offered to assume Exeter's liabilities and assets and to pay a premium of $186,500 which, however, would be held in escrow for six months to pay for losses not covered by Exeter's fidelity bonds (App. 125a). Because less than a majority of Exeter's directors favored the proposal, and because the premium Pittston offered appeared large in relation to the size of its assets, the Comptroller concluded that the proposed transaction was not acceptable (Comp. App. 2b).

On February 19, 1962, no progress having been made toward a sale or reorganization, the Comptroller appointed a Conservator in order to conserve the assets of the bank for the benefit of depositors and other stockholders (Pet. App. 22; Comp. App. 2b).

On the morning of February 26, 1962, the Wyoming National Bank of Wilkes-Barre (hereafter "Wyoming"), through its officers, offered to assume all of

[2] The Comptroller, of course, has the statutory authority and duty to examine national banks to insure that their assets are sufficient to meet their liabilities, including deposits, and if the bank is ailing or failing, to appoint a conservator to safeguard its deposits, or a receiver to wind up its affairs. 12 U.S.C. 191, 203. In order to effectuate this statutory authority, the Comptroller has, in appropriate circumstances, followed a policy of urging a bank in financial difficulties to sell its assets and transfer its liabilities to a sound bank with able management and adequate capital. This course permits continuous banking services to the community and assures the protection of depositors and other creditors. More than thirty years ago that policy had already "become something of a custom" in the banking industry, and had been approved by the courts as being "in the public interest." *City National Bank of Huron, S.D.* v. *Fuller*, 52 F. 2d 870, 873 (C.A. 8, 1931).

the liabilities of the Exeter Bank, except its liabilities to shareholders, and to pay a premium of $120,000, plus 40% of any recovery on its excess bond (Pet. App. 22; App. 126a). At a special meeting of the Exeter Board of Directors, a majority of six directors voted to accept the Wyoming offer, while three declined to vote (Pet. App. 23; App. 126a). That afternoon, at a meeting of the Wyoming Board of Directors, the offer of its officers was unanimously approved and ratified (Pet. App. 23; App. 126a–127a). By telegram dated 6:14 P.M., E.S.T., February 26, 1962, the Comptroller terminated the conservatorship of Exeter, effective at the close of business that day, and returned the assets of the bank to its Board of Directors "for the purpose of executing a sale of all of the assets of the bank to the Wyoming National Bank of Wilkes-Barre." In addition, pursuant to R.S. 5220, as amended, 12 U.S.C. 181, he determined that an emergency existed, and waived the statutory requirement of stockholder approval for the purchase and sale agreement (Pet. App. 23–24; App. 127a). The contract was later approved by the Comptroller, pursuant to the authority vested in him by the Bank Merger Act of 1960, 12 U.S.C. (Supp. V) 1828(c).

Late in the afternoon of February 26, 1962, the contract between Wyoming and Exeter was executed and, at a meeting of Exeter's board of directors held on March 26, 1962, the purchase and sale agreement was confirmed (Pet. App. 24; App. 127a).

2. Petitioners brought this derivative stockholder's action in the district court against the six majority

directors of Exeter, the Exeter bank, the Wyoming bank, and the Comptroller of the Currency, to have declared invalid the purchase and sale agreement between the two banks, and to annul the Comptroller's appointment of a conservator, and his approval of the merger (App. 7a–17a; 24a–30a).

The Comptroller of the Currency moved to dismiss or in the alternative for summary judgment, asserting that his actions were discretionary and not subject to judicial review (App. 23a, 31a–32a). The district court agreed with the Comptroller and dismissed the complaint as against him (App. 33a–35a). The action proceeded to trial on the issues between petitioners and the remaining defendants. The district court ruled that the offer from Wyoming was the best offer made to Exeter, that the purchase and sale agreement was a valid and legally binding contract, and that the majority directors were not in breach of any fiduciary obligations in voting to accept that offer (App. 129a). Accordingly, the court dismissed the complaint (App. 130a).

The court of appeals approved the disposition of the controversy, except insofar as the district court refused to grant judicial review of the Comptroller's determination that there was an emergency warranting waiver of the statutory requirement of approval by holders of two-thirds of the stock of a bulk sale of assets. While recognizing that "it is manifest that the Comptroller is charged with the fundamental power of decision on this question" (Pet. App. 38), the court ruled that Congress intended such deter-

minations to be subject to judicial review, and remanded the case to the district court for an evidentiary hearing and ruling as to whether the Comptroller's determination of the existence of the emergency was reasonable in view of the facts which he knew or should have known[3] (Pet. App. 35–39).

ARGUMENT

The decision of the court of appeals calls for a remand and an evidentiary hearing in the district court on one issue. The remaining issues are not of general significance, and were, in any event, correctly decided below. There is no conflict of decisions. Accordingly, there is no occasion for further review in this Court, especially in the present interlocutory posture of the litigation.

1. Petitioners contend that the contract between the Wyoming and Exeter banks was invalid, because it was accepted in conservatorship, so that approval of the district court was a condition precedent to a valid contract for a bulk sale of assets (Pet. 9–14). The short answer to this contention is that the contract was subsequently ratified by a majority of Exeter's directors, and, indeed, by a majority of the stockholders. The ratification occurred after the termination of the conservatorship (Pet. App. 24, 29; App. 127a–128a). The court of appeals was clearly correct in treating the contract as at most voidable, rather than void (compare Pet. 13), and ruling that the subsequent events rendered moot any contentions

[3] The court expressly noted that the standard of judicial review to be applied "is not whether an emergency in fact existed" (Pet. App. 38).

as to the possible incapacity of the directors to enter into the contract on February 26, 1962 (Pet. App. 26–27).[4]

2. Petitioners next contend that the statutory requirement (R.S. 5220, as amended, 12 U.S.C. (Supp. V) 181, *supra*, pp. 2–3), of approval of a bulk sale of assets of a national bank by shareholders owning two-thirds of the stock can only be waived by the Comptroller if an emergency in fact exists, and that there was no such emergency in regard to Exeter on February 26, 1962 (Pet. 14–20). The court of appeals has ruled, contrary to our position below,[5] that petitioners are entitled to a trial on the issue of the reasonableness of the Comptroller's determination of an emergency (Pet. App. 29–39). Petitioners' contention is, in effect, that the Comptroller's determination—and the basis upon which it rested—should be given no weight in such a proceeding.

Petitioners' reading of the statute would transfer

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[4] The cases relied upon by petitioner (Pet. 13), *Central Transp. Co.* v. *Pullman Palace Car Co.*, 139 U.S. 24, and *Dillon, Read & Co.* v. *Commercial State Bank*, 62 F. 2d 606 (C.A. 3, 1932), involve contracts held to be void because the corporation had no authority to enter into them. In this case, of course, the Exeter bank clearly had authority to enter into the contract, the only question being who had authority to act for that bank.

[5] We reserve, of course, our right to contend at an appropriate time that the Comptroller's authority to waive two-thirds stockholder approval under 12 U.S.C. 181 is, like his authority to place ailing or failing national banks into conservatorship or receivership, an authority committed to his discretion, and not subject to judicial review. See *Adams* v. *Nagle*, 303 U.S. 532.

the fundamental decision-making power from the Comptroller to the district court. No such result was intended. The legislative history of the 1959 amendment which imposes the statutory requirement of two-thirds stockholder approval indicates that the purpose of the legislation was simply to enact into statutory law the pre-existing policy of the Comptroller to require stockholder approval of bulk sales leading to liquidation of a national bank, and his discretionary authority to waive such a requirement.[6] Unless the fundamental decision-making power is to be taken away from the Comptroller, judicial review, if any, must be confined to inquiring into the reasonableness of the Comptroller's decision (Pet. App. 38).[7]

The question of the scope of review to be accorded the Comptroller's determination of an emergency under the 1959 amendment is, at any rate, one of very limited application and importance. Indeed, so far as we are aware, this is the first case arising under that amendment. There is, moreover, no occasion for this Court to depart here from its usual practice of declining to review cases at an interlocutory stage, before the factual record has not been fully made.

[6] "* * * while it has been the policy of the Comptroller of the Currency to require that the shareholders also approve the purchase and sale agreement, it is believed that there should be a statutory requirement of such approval. The Comptroller of the Currency may waive this requirement for shareholder approval if an emergency exists." H. Rep. No. 694, 86th Cong., 1st Sess., p. 3 (1959), quoted more fully by the court of appeals, Pet. App. 30. See, also, quotations from Hearings, Pet. App. 31–32.

[7] The cases cited by petitioners on this point (Pet. 16–17) were all decided before the enactment of the pertinent statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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